FILED
JUN 19 1995
CLERK

(2)

No. 94-1894

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

THE CADLE COMPANY,

Petitioner,

v.

BANKSTON & LOBINGIER, a Partnership, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE COURT OF APPEALS
SECOND COURT OF APPEALS DISTRICT OF TEXAS,
AT FORT WORTH

BRIEF IN OPPOSITION BY RESPONDENTS DAVID B. LOBINGIER AND THE COMMUNITY ESTATE OF DAVID B. LOBINGIER AND GAY A. LOBINGIER

DAVID L. EVANS
(Counsel of Record)
JEFFREY H. KOBS
HOOPER, EVANS & KOBS, L.L.P.
800 Fort Worth Club Building
306 West 7th Street
Fort Worth, Texas 76102-4991
(817) 335-9377 (Telephone)
(817) 332-6962 (Facsimile)
Counsel for Respondents.

June 19, 1995

Washington, D.C. • THIEL PRESS • (202) 328-3280

BEST AVAILABLE COPY

14pp

QUESTION PRESENTED

Does the "deemed admission" provision in Tex. R. Civ. P. 169 meet the constitutional requirement of due process under the Fourteenth Amendment of the United States Constitution when the rule mandates automatic sanctions against a party without prior notice or an opportunity for the party to be heard on the issues involved?

LIST OF PARTIES

Petitioner:	The Cadle Company
Respondents:	Bankston & Lobingier, a Partnership
	David B. Lobingier and the community estate of David B. Lobingier and Gay A. Lobingier

Page

TABLE OF CONTENTS

QUESTION PRESENTED. i
LIST OF PARTIES ii
TABLE OF CONTENTS. iii
TABLE OF AUTHORITIES iii
OPINIONS BELOW. 2
STATEMENT OF JURISDICTION. 2
STATEMENT OF THE CASE 3
ARGUMENT AND AUTHORITIES 4
CONCLUSION 9

TABLE OF AUTHORITIES

Cases:

Bailey v. Anderson, 326 U.S. 203 (1945). 2, 3

Cudd v. Hydrostatic Transmission, Inc., 867 S.W.2d 101 (Tex. Ct. App. - Corpus Christi, 1993). 7

Employers Insurance of Wausau v. Halton, 792 S.W.2d 462 (Tex. Ct. App. - Dallas 1990, *no writ*). 7, 8

Gee v. Liberty Mut. Fire Insurance Co., 765 S.W.2d 394 (Tex. 1989) 7

North River Insurance Company v. Greene, 824 S.W.2d 697 (Tex. Ct. App. - El Paso, 1992, *no writ*). 8

Patterson v. New York, 432 U.S. 197 (1977) 4

Texas Employer's Ins. Ass'n v. Bragg, 670 S.W.2d 712 (Tex. Ct. App. - Corpus Christi 1984, *writ ref'd n.r.e.*) 8

Trevino v. Central Freight Lines, 613 S.W.2d 356 (Tex. Ct. App. - Waco 1981, *no writ*) 8

Statutes:

	Page
28 U.S.C. Sec. 1257(a)	2
Fed. R. Civ. P. 36	4
Tex. R. App. Pro. 52	6
Tex. R. App. Pro. 83	7
Tex. R. App. Pro. 184	7
Tex. R. Civ. Evid. 103	6
Tex. R. Civ. Evid. 201	6
Tex. R. Civ. Pro. 21(a)	5
Tex. R. Civ. Pro. 23	6
Tex. R. Civ. Pro. 25	6
Tex. R. Civ. Pro. 76	6
Tex. R. Civ. Pro. 169	2-7

No. 94-1894

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

THE CADLE COMPANY,

Petitioner,

v.

BANKSTON & LOBINGIER, a Partnership, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE COURT OF APPEALS
SECOND COURT OF APPEALS DISTRICT OF TEXAS,
AT FORT WORTH

BRIEF IN OPPOSITION BY RESPONDENTS DAVID B. LOBINGIER AND THE COMMUNITY ESTATE OF DAVID B. LOBINGIER AND GAY A. LOBINGIER

TO THE HONORABLE SUPREME COURT;

The Respondents, David B. Lobingier and the Community estate of David B. Lobingier and Gay A. Lobingier, respectfully request that this Court deny the Petition for Writ of Certiorari submitted by Petitioner, The Cadle Company.

OPINIONS BELOW

The opinion of the Second Court of Appeals District of Texas at Fort Worth sought to be reviewed by Petitioner is correctly set forth in Petitioner's appendix A. Petitioner correctly describes and attaches the opinions and procedural history of the case.

STATEMENT OF JURISDICTION

The Petitioner seeks to invoke the jurisdiction of this court pursuant to 28 U.S.C. §1257(a). Respondents deny that jurisdiction is proper because Petitioner failed to attack the constitutionality of Tex. R. Civ. P. 169 at the trial court level or before the Court of Appeals by point of error. Petitioner raised the constitutional issue for the first time in its motion for rehearing. The Court of Appeals denied the motion for rehearing without opinion, and without reviewing the constitutional argument. The Texas Supreme Court refused to grant writ of error or review the constitutional arguments made by Petitioner.

In *Bailey v. Anderson*, 326 U.S. 203 (1945), this Court declined to review the constitutionality of a Virginia condemnation statute which was attacked for the first time by assignment of error to the Virginia Supreme Court. Mr. Chief Justice Stone wrote: ". . . throughout the proceedings in the circuit court appellate made no claim to interest on constitutional grounds, and made no attack on the constitutionality of the award to the court's decree because of the asserted denial of interest." 326 U.S. at 206. "Appellant for the first time, assailed on constitutional grounds the asserted denial of interest by his assignments of error in the state Supreme Court of Appeals. . . . On this record we cannot say that . . . the Supreme Court of Appeals of Virginia, by denying writ

of error, passed upon any question of the constitutionality of such denial of interest, not raised on the record or passed upon below. Unless this affirmatively appears on the record brought here for review on appeal, this court is without jurisdiction of this appeal." 326 U.S. at 207.

STATEMENT OF THE CASE

Respondent David Lobingier obtained a judgment against Petitioner for $300,000 following a bench trial. The judgment reflected actual damages awarded to Mr. Lobingier as a result of the Petitioner's breach of an agreement with Respondent.

The Petitioner concedes that during the discovery phase of such suit, the Respondent filed a set of requests for admissions with the trial court pursuant to Tex. R. Civ. P. 169 (Petition, page 5 and 6). Petitioner further concedes that no responses were filed to the requests for admissions (Petition, page 6).

The Requests for Admissions at issue were served on March 16, 1992. (Petition p. 28a).

The statement of facts reflects that the trial before the court commenced on October 6th, 1992. Therefore, 204 days elapsed from the time that the requests for admissions were filed among the papers of the case until the commencement of the trial. During this entire period of time, Petitioner and its counsel could have ascertained, by a simple inspection of the file, that such requests had been filed. The transcript further indicates that Respondents filed a Second Request for Admissions on September 3, 1992, slightly more than thirty-three days before trial, and served the same counsel for Petitioner. Thus, the Petitioner's attorneys were advised well before the trial by the title of such pleadings as the Second Request

for Admissions that in all probability a First Request for Admissions existed. In fact the Second Request for Admissions was discussed at trial. (SOF 101-105).

Finally, during the trial, the court was requested to take judicial notice of the contents of its entire file and the court did so without objections from the Petitioner. (SOF 105).

ARGUMENT AND AUTHORITIES

Tex. R. Civ. P. 169 is patterned after Fed. R. Civ. P. 36. The Rule provides, in language identical to Rule 36, that requests which are unresponded to are deemed admitted. The pertinent provision states:

> The matter is admitted without necessity of a court order unless, within thirty days after service of the request, or within such time as the court may allow, or as otherwise agreed by the parties, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter. . . .

Tex. R. Civ. P. 169(1).

This Court has long recognized that a state may regulate the procedure of its courts in accordance with its own concept of policy and fairness, unless it offends a fundamental principle of justice or unless the procedure is unreasonable or arbitrary. *Patterson v. New York*, 432 U.S. 197 (1977).

Petitioner argues that due process is denied because the rule mandates automatic sanctions against a party (1) without prior notice or (2) an opportunity to be heard on the issue involved. Respondent argues below that the Texas Rules of Civil Procedure are not unreasonable or arbitrary and that due process is not denied because

notice and an opportunity to be heard are provided by the Rules.

In determining whether the provisions of Rule 169 constitute an impermissible denial of due process, the procedures outlined in the rule should be construed in context with the overall procedural system utilized by Texas courts. The system is codified in the Texas Rules of Civil Procedure.

As discussed previously, Rule 169 incorporates several components to forward notice and opportunity to be heard to litigants. Each is discussed below.

Rule 169 provides that: "at any time after commencement of the action, a party may serve upon any other party a written request. . . ." Thus, the availability of requests for admissions are limited to periods after the commencement of the action and thus after the original notice to a party that a proceeding has been instituted against it. This section of the Rule further provides that such party must be served with a written request. Accordingly, an oral request for an admission is unauthorized by the rule. Service of the request is governed by Tex. R. Civ. P. 21(a) which governs method of service in Texas and provides that "every . . . request" may be served by delivering a copy to the party to be served, or the party's duly authorized agent or attorney of record either in person or by certified or registered mail.

According to Texas procedure, the certificate of service is prima facie proof of service. Tex. R. Civ. P. 21(a) provides in pertinent part:

> The party or attorney of record shall certify to the court compliance with this rule in writing over signature and on the filed instrument. A certificate by a party or an attorney of record, or the return

> of the officer, or the affidavit of any other person showing service of a notice shall be prima facie evidence of the fact of service.

Rule 169 further provides that "a true copy of a request for admission . . . shall be filed promptly in the clerk's office by the party making it." Tex. R. Civ. P. 23 and 25 require the clerk of the court to maintain a docket which "shall show in convenient form . . . all subsequent proceedings had in the case with the dates thereof" and further to "mark on each paper in every case the file number of the cause." The purpose of this procedure is to make and keep an official record of the documents filed in the cause and to collect those documents by file number such that they may be inspected by the parties to the cause or their attorneys. Tex. R. Civ. P. 76 provides that "each attorney at law practicing in any court shall be allowed at all reasonable times to inspect the papers and records relating to any suit or other matter in which he may be interested."

At trial, Respondent requested the trial court to take judicial notice of the contents of its file. *See* Tex. R. Civ. Evid. 201. Error in a case may not be predicated upon a ruling which admits evidence unless a substantial right of the parties affected and there is a timely objection or motion to strike the admitted evidence. Tex. R. Civ. Evid. 103. In order for a party to preserve a complaint for appellate review, a party must have presented to the trial court a timely objection stating the specific grounds for the ruling he desires the court to make. Further, the party must obtain a ruling upon the objection. Tex. R. App. P. 52. No judgment is reversed in Texas unless the error complained of amounts to such a denial of rights of the appellant as was reasonably calculated to cause and probably did cause rendition of an improper

judgment in the case. Tex. R. App. P. 83, 184; *Gee v. Liberty Mut. Fire Insurance Co.*, 765 S.W.2d 394, 396 (Tex. 1989).

It is apparent that no error was preserved at the trial court level or at the court of appeals with regard to the consideration of the request for admissions. The court of appeals' opinion does not rest upon the deemed admissions alone. The opinion states that it is based on testimony and deemed admissions. (See p. 15(a) of Petition for Writ of Certiorari). A review of the Statement of Facts discloses that there was testimony presented to the trier of fact with regard to the failure to withdraw the adverse credit report and damages suffered by the Defendant. Thus, under the Rules of Appellate Procedure and the case law of the State of Texas, the consideration of the deemed admissions could not be reversible error since there was other testamentary evidence available to support the judgment.

Tex. R. Civ. P. 169 allows the trial court to permit the withdrawal of deemed admissions:

> upon a showing of good cause for such withdrawal or amendment if the court finds that the parties relying upon the responses and deemed admissions will not be unduly prejudiced and that the presentation of the merits of the action will be subserved thereby.

Texas appellate courts routinely examine the failure to respond to requests for admission and the procedure set forth in Rule 169 for the withdrawal of the deemed admissions. In *Cudd v. Hydrostatic Transmissions, Inc.*, 867 S.W.2d 101, 105 (Tex. Ct. App.—Corpus Christi 1993, *no writ*), the court held that withdrawal of deemed admissions should be permitted when responses were filed less than one week late. In *Employers Insurance of*

Wausau v. Halton, 792 S.W.2d 462, 466 (Tex. Ct. App.–Dallas 1990, *no writ*) the court held that when an attorney prepared handwritten responses which were inadvertently placed in the file rather than being typed and mailed, withdrawal was proper. In *North River Insurance Company v. Greene*, 824 S.W.2d 697 (Tex. Ct. App.–El Paso 1992, *writ denied*), an attorney's mistake in calendaring a response date was found to be sufficient cause to permit withdrawal.

Conversely, in *Trevino v. Central Freight Lines*, 613 S.W.2d 356, 360 (Tex. Ct. App.–Waco 1981, *no writ*) and *Texas Employer's Ins. Ass'n v. Bragg*, 670 S.W.2d 712, 715 (Tex. Ct. App.–Corpus Christi 1984, *writ ref'd n.r.e.*), the appellate court in each case upheld a trial court's refusal to permit withdrawal or amendment. In *Trevino*, the requests for admissions were ignored for a period of eleven months and the motion to withdraw deemed admission was not filed until the day of trial.

In *Bragg*, the responses were three months late and again, the motion to withdraw deemed admissions was not filed until the day of trial.

In short, the Texas Rules of Civil Procedure afford adequate provisions for the notification of parties that Requests for Admissions have been filed and an adequate opportunity for a party failing to respond to such requests to be heard and to obtain relief. Petitioner failed to avail itself of these opportunities by failing to respond timely, failing to inspect the clerk's file docket or the clerk's file, failing to object at trial to the court's judicial notice of the file containing the Requests for Admission, and failure to request, at any stage of the proceedings, the withdrawal of the deemed admissions. The existence of other testimony to support the judgment bolsters the fact that consideration of the admissions could not be harmful.

CONCLUSION

Respondents respectfully pray that the petition for *writ of certiorari* be in all things denied for the reasons set forth above.

Respectfully submitted,

DAVID L. EVANS
State Bar No. 06713080
(Counsel of Record)

JEFFREY H. KOBS
State Bar No. 11642500

HOOPER, EVANS & KOBS, L.L.P.
800 Fort Worth Club Building
306 West 7th Street
Fort Worth, Texas 76102-4991
(817) 335-9377 (Telephone)
(817) 332-6962 (Facsimile)

Counsel for Respondents.